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January 14, 2004

Ex Parte

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Verizon Telephone Companies Petition For Reconsideration, "In the Matter of Stale or Moot Docketed Proceedings", CC Docket Nos. 93-193, 94-65 and 94-157

Dear Ms. Dortch:

Yesterday, on behalf of Verizon, Ed Shakin and the undersigned met with Matt Brill of Commissioner Abernathy's office to discuss the above captioned proceeding. The attached material was discussed.

Please do not hesitate to contact me with any questions.

Sincerely,

A handwritten signature in cursive script, appearing to read "Joseph Mulieri".

Attachments

cc: M. Brill

Petition for Reconsideration

- **Reinstatement of the terminated proceeding was long after the time for reconsideration and judicial review had expired.**
 - On February 25, 2003, the FCC reinstated the investigation in Docket 94-157 of various issues relating to the treatment of other postretirement employee benefits (“OPEBs”) in the 1993 through 1996 tariffs.
 - The investigation had been terminated in a January 25, 2002 order terminating a number of “stale or moot” proceedings.
 - The deadline for correction of the mistake expired on March 12, 2002, the final date for filing an appeal; the reinstatement order was adopted nearly a year later, on February 25, 2003.

Petition for Reconsideration

- **The Commission cannot “correct” a final order that contains a substantive mistake long after the time for reconsideration and judicial review has expired.**
 - The Commission itself characterized the termination of Docket 95-157 as an “inadvertent technical error.”
 - An agency can correct “clerical mistakes,” like typos, at any time; see FRCP Rule 60(a) “clerical mistakes . . . may be corrected at any time.”
 - But an agency can correct substantive mistakes only while the case is still pending, i.e., within the time for reconsideration or judicial review; see FRCP Rule 60(b) “mistake, inadvertence, surprise, or excusable neglect” may be corrected only within specified time limit.
 - The Commission's error here is well outside the category of clerical errors.

Petition for Reconsideration

- **The Commission itself has recognized and applied this standard to limit its authority in analogous situations.**
- Commission authority to revisit final actions “extends only to the correction of clerical or administrative errors that underlie or occur in the process of taking an action, such as a mathematical miscalculation, or a license that omits or misstates a frequency, or a document that omits an intended party or provision.” *County of San Mateo, California*, Order on Review and Reconsideration, 16 FCC Rcd. 4291, 8 (2001). See also, *California Water Service Company*, 18 FCC Rcd. 11609, 18 (2003).
- The taking of an erroneous action itself, is not generally ministerial error that can be corrected after the 30-day period has elapsed under 47 C.F.R. 1.113(a).” *San Mateo*, 8.
- **The Commission’s closure of the OPEB investigation was a discretionary action subject to the same limits.** “*We have reviewed* the docket proceedings listed in the appendix, and *have determined* that the dockets should be terminated.” Termination Order, 1 (emphasis added).

Remaining OPEB Issues

- **If the FCC intends to continue the OPEB investigation, there are only two remaining issues -**
 - **Bell Atlantic's adoption of OPEB accounting in 1991 and 1992**
 - **Reversal of RAO Order excluding OPEB liabilities from the rate base**
- **The 2/25/03 order stated that the FCC would terminate the investigation for any OPEB issues that are not raised in response to the order**
- **No party raised any additional issues**

1993 Access Tariff Filing Direct Case

- **OPEB related costs incurred prior to January 1, 1993 are eligible for exogenous treatment.**
 - Verizon should not be penalized for complying with an approved accounting practice prior to the last date for adoption.
 - Not only did Verizon adopt OPEB within the period authorized by the Bureau's order, but the Bureau specifically noted that "earlier implementation is encouraged." Therefore, adoption of OPEB was "mandatory" regardless of when a carrier implemented it.
 - A cost change resulting from a change in generally accepted accounting practices approved by the Commission is beyond a carrier's "control" and eligible for exogenous treatment regardless of whether a carrier has control over the timing or amount of the underlying costs. (*Southwestern Bell v. FCC*)
 - The Common Carrier Bureau's order approving the OPEB change leaves no doubt on this issue, since it required the carriers to implement the change "on or before January 1, 1993," not "on January 1, 1993" or "no earlier than January 1, 1993."
 - The delay in seeking exogenous treatment until 1993 was due to the Commission's own error in rejecting the previous tariff filings seeking exogenous treatment of OPEB costs (reversed in *Southwestern Bell*).

1993 Access Tariff Filing Direct Case

- No Refunds Would Be Appropriate Even If The Commission Disallowed The Exogenous Cost Adjustments For Pre-Jan. 1, 1993 OPEB Costs
- Verizon's total cost exogenous adjustments for pre-1993 OPEB costs during the 1993-95 tariff period were less than the amount by which Verizon's interstate access rates were below cap.
 - 1993-1994 access rate headroom -- \$45.6 million
 - 1993-1994 OPEB pre-1993 costs -- \$36.8 million
 - 1994-1995 OPEB pre-1993 costs -- \$2.2 million
- Disallowance Of These Costs Would Still Leave Customers With Rates Below Cap During The Two-Year Period For Recovery Of Pre-1993 OPEB Costs

RAO 20 Rescission Order; 1996 Access Tariff Investigation

- Verizon increased its price cap indices for the 1996 access tariff filings by properly adjusting its rate base treatment of OPEBs for prior years.
- As the Court found in *Southwestern Bell*, an agency is obliged to follow its own rules until it changes them after notice and comment, and then only prospectively.
 - RAO 20 wrongfully required the price cap carriers to deduct unfunded OPEB liabilities from the regulated interstate rate base. The effect was to increase the carriers' rates of return and their "sharing" obligations under the old price cap regime.
 - On March 7, 1996, the Commission recognized that RAO 20 was inconsistent with its rules and it rescinded the portion of RAO 20 that had instructed the carriers to deduct unfunded OPEB liabilities from the regulated interstate rate base.
 - Verizon restated its 1993 and 1994 rate base and rates of return, causing a reversal of sharing obligations. It reflected the reversals as exogenous cost increases in its 1996 access tariff filing.
- Any other action by Verizon would have been inconsistent with the Commission's rules in place at the time.